

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

RUSSELL D. HENION,)	CIVIL NO. 06-00298 LEK
)	
Plaintiff,)	
)	
vs.)	
)	
UNITED STATES POSTAL SERVICE)	
and JOHN E. POTTER,)	
POSTMASTER GENERAL,)	
)	
Defendants.)	
_____)	

**ORDER AFFIRMING MERIT SYSTEMS PROTECTION
BOARD'S DECISION AND GRANTING DEFENDANTS'
MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT**

On November 10, 2008, this Court held a hearing on Plaintiff Russell D. Henion's ("Plaintiff") Appeal from Merit Systems Protection Board ("MSPB") Ruling, and Defendants United States Postal Service ("the Agency") and Postmaster General John E. Potter's (collectively "Defendants") Motion to Dismiss, and/or for Summary Judgment, filed September 8, 2008 ("Motion"). Appearing on behalf of Plaintiff was Elbridge Smith, Esq., and appearing on behalf of Defendants was Assistant United States Attorney Edric Ching. After careful consideration of Plaintiff's appeal, Defendant's Motion, supporting and opposing documents, and the arguments of counsel, the MSPB's decision is HEREBY AFFIRMED, and Defendants' Motion is HEREBY GRANTED for the reasons set forth below.

BACKGROUND

I. Factual Background

Plaintiff was previously employed by the Agency as a Custodial Group Leader at the Processing and Distribution Center of the Honolulu Airport. On October 11 and 12, 2002, Plaintiff worked his usual 10:30 p.m. to 6:30 a.m. shift. [Defendants' Supplemental Excerpts of Record ("SER") at 2 (Administrative Judge's Initial Decision, dated 5/14/04 ("Initial Decision") at 2).]

The Processing and Distribution Center has twenty-nine fixed video cameras that monitor specific areas within and on the perimeter of the facility. The camera feeds are recorded, but they are not continuously monitored. On October 11, 2002, cameras 3 and 14 were moved so that they pointed toward the ceiling instead of at their designated areas. Camera 3 covers an area used by a vendor, the post office boxes, and the main office window. Camera 14 covers a portion of the accountable mail area, *i.e.* the registry. Bryant Petty, the Building Equipment Mechanic whose duties included maintenance of the security cameras, returned camera 3 to its original position by adjusting the bolt and nut securing it. He also repositioned camera 14. According to Mr. Petty, camera 14 cannot be repositioned simply by pushing on it. In order to point camera 14 to the ceiling, a person would have to pull on the cord and conduit at the rear of the

camera. Other than changing it to cover a new area, Mr. Petty never had to reposition camera 14 before October 11, 2002. [Id. at 2-3.]

On October 12, 2002, cameras 1, 2, 3, and 14 were moved. The video tapes from the cameras show that Plaintiff was in each of those areas when the camera was moved. Several days later, Plaintiff's supervisor referred to Plaintiff having damaged government property and alluded to the possibility of disciplinary action. On October 23, 2002, Plaintiff went to the Postal Inspection Service to volunteer a statement about the cameras. Plaintiff spoke to Postal Inspector Richard Hall, who stated that he was not handling the camera investigation, but that the wanted to talk to Plaintiff about another matter. Plaintiff told Inspector Hall that he would write out a statement about the other incident and return with it. According to Plaintiff, as he was leaving, Inspector Hall said to a woman in the office, "He has to go now. I asked him to bring a statement back tomorrow." Although Plaintiff did not know her identity at the time, Plaintiff later learned that the woman was Postal Inspector Kathryn Derwey, who was handling the camera investigation. Plaintiff never returned to provide a statement about either matter. [Id. at 3-4.]

Inspector Derwey completed an "Investigative Memorandum" dated January 6, 2003. [Exh. E to Defs.' Concise

Stat. of Material Facts in Supp. of Defendants' Motion ("Defs.' CSOF").] On February 21, 2003, Plaintiff was placed on "emergency" suspension.¹ Plaintiff was returned to duty for his March 31, 2003 "day in court" meeting with Eugene Sano, the Manager of Maintenance Operations. Plaintiff was subsequently returned to regular duty. After his return to duty, Plaintiff was assigned the additional daily task of patrolling the fence on the perimeter of the facility. [Initial Decision at 5.]

During the day in court meeting, Mr. Sano questioned Plaintiff based upon the format of the Investigative Memorandum. Mr. Sano proposed Plaintiff's removal, and Herbert Yokoyama, Manager of Maintenance,² concurred. The proposed removal was based upon one charge of "unacceptable conduct", supported by two specifications: the unauthorized repositioning of four security cameras on October 12, 2008; and the failure to cooperate with the security camera investigation. Plaintiff received notice of the proposed removal approximately two weeks after the day in court meeting. [Id. at 6.]

On April 28, 2003, a union steward presented

¹ The duration of Plaintiff's suspension is uncertain. Plaintiff testified that he filed a grievance regarding the suspension, but he did not appeal the ruling regarding the suspension. [Initial Decision at 5 & nn.6 & 7.]

² Although they have similar titles, Mr. Yokoyama is Mr. Sano's supervisor. [Defs.' CSOF, Decl. of Herbert Yokoyama at ¶¶ 1, 4.]

Plaintiff's response to the charges. Plaintiff did not attend the meeting. He testified that he did not attend because, when he received the notice of the proposed removal, Mr. Sano told him that Glen Sakagawa, the Senior Manager, did not want to see him. The Agency issued its decision on May 9, 2003. Mr. Sakagawa sustained both charges and ordered Plaintiff's removal as of May 30, 2003. [Id. at 7; Exh. A to Defs.' CSOF (Letter of Decision - Removal).³] The union president sought to have a last chance agreement substituted for the removal, but Mr. Sakagawa determined that the infraction was too severe. [Initial Decision at 7; Record on Appeal, filed 2/15/08 (dkt. no. 39-4), Initial Appeal File - Volume I, part 1, at 54 (Letter dated 6/20/03).⁴]

II. Administrative Proceedings

On June 17, 2003, Plaintiff filed an appeal to the MSPB. A hearing was held on October 20, 2003, with closing arguments conducted by telephone on November 25, 2003. Administrative Judge Sidney Farcy ("the AJ") issued the Initial Decision on May 14, 2004. The AJ found that the Agency proved the charge of unacceptable conduct with regard to the repositioning of the security cameras, but had not proven the charge with regard to the failure to cooperate with the

³ The Letter of Decision can also be found at SER 86-89.

⁴ The page numbers refer to the pages as numbered in the district court's Electronic Document Filing System.

investigation. The AJ, however, affirmed Plaintiff's removal, finding that it was within the bounds of reason based on Plaintiff's misconduct. [Initial Decision at 1-2.]

The AJ found that Plaintiff "deliberately moved the security cameras without authority to do so." [Id. at 8.] The AJ noted that, shortly after the security cameras were installed, Plaintiff attended an employee training session during which employees were told about the cameras. Plaintiff admitted that he is the person seen in the video tapes before the cameras are moved. He also admitted that he moved the cameras, but he claimed that he inadvertently moved the cameras while attempting to clean them. The AJ, however, found that Plaintiff's explanation was not credible. [Id.]

Plaintiff testified that, on October 11, 2002, he attempted to clean camera 3 because he saw black dust on it. He stated that he must have hit the back of the camera and moved it while trying to dust it. Plaintiff stopped trying to clean camera 3 because his efforts were unsuccessful. He tried to clean camera 14, in the registry area, because he thought the cameras in that area would be even more dirty than those in the Post Office Box area, where camera 3 is. In addition, Plaintiff testified that someone asked him to clean the spider webs on the back of camera 14. Plaintiff stated that he accidentally moved camera 14 while trying to clean the spider webs. He looked for a

ladder so that he could reposition the camera, but the only one he found was too heavy for him to lift. Plaintiff told someone in the maintenance room that he needed a ladder because something was out of position. [Id. at 8-9.]

On October 12, 2002, Plaintiff returned to try to finish cleaning cameras 3 and 14. He noted that the cameras had been returned to their original positions. When he tried to clean them, they moved again, and he could not find a ladder to reposition them. Plaintiff testified that he tried to reposition camera 3 with a broom. He also testified that, after he accidentally hit camera 14, it swung so erratically that he thought it would fall. Plaintiff tried to clean camera 2 because there were bird droppings on it. [Id. at 9.] The AJ acknowledged that "it is more likely than not that those cameras were exposed to birds." [Id. at 9 n.17.] Plaintiff testified that he may have told a Mr. Sugihara, the supervisor of maintenance operations, about the cameras. [Id. at 9 & n.18.]

The AJ found that Plaintiff's testimony about the cameras' movement was not credible. In so finding, the AJ noted that, during the day in court meeting, Plaintiff: 1) denied that he was the person seen on the video tapes;⁵ 2) denied knowing

⁵ The AJ however gave little weight to the denial because Plaintiff did not have access to the video tape during the day in court meeting. Plaintiff merely responded to a description of the tape. [Initial Decision at 10 n.19.]

that he moved the cameras while cleaning them; 3) did not mention looking for a ladder to reposition the cameras; and 4) claimed that he observed cobwebs on the cameras, but did not mention any complaints about them. The AJ stated that it was unlikely that Plaintiff's memory about the incident improved since the day in court meeting. Further, the AJ found it "beyond belief" that an employee who moved two cameras one day would repeat his actions several times the next day, particularly where one of the cameras swung so violently that Plaintiff thought it would fall. [Id. at 10.] The AJ noted that Plaintiff argued that the summary of the day in court meeting was inaccurate and that he never denied moving the cameras. The AJ found that Mr. Sano's contemporaneous typewritten notes of the day in court meeting were more credible than Plaintiff's testimony. [Id. at 10 n.20; Record on Appeal, filed 2/15/08 (dkt. no. 39-5), Initial Appeal File, Volume I, part 2, at 2-3 (typewritten notes of Day in Court (Russell D. Henion)).] The AJ noted that the only clear view of Plaintiff moving the cameras came from camera 14. The tape shows that Plaintiff used "considerable force and appear[ed] to be striking at the camera, rather than merely dusting cobwebs."⁶ [Initial Decision at 11.] Further, Plaintiff claimed that the camera moved violently when he tried to reposition it with the

⁶ Based on his review of the tape, however, the AJ disagreed with Mr. Sakagawa that Plaintiff used the handle of broom, rather than the bristles, on the camera. [Initial Decision at 11.]

broomstick, but all four video tapes show virtually no movement after the camera is moved out of position. The AJ also noted that other cameras filming the vicinity of the moved cameras showed that Plaintiff was only in each area for a brief time. The AJ found that this was inconsistent with Plaintiff's claim that he tried to reposition the cameras after moving them. The AJ expressed concern about Plaintiff's clear knowledge that he was being filmed when he moved the cameras.⁷ The AJ found that the evidence as a whole proved that Plaintiff intentionally moved the cameras. [Id. at 11-12.]

With regard to the failure to cooperate charge, the AJ found that Plaintiff never received proper notice that he was expected to cooperate with the camera investigation by giving a statement. Inspector Derwey testified that she never attempted to contact Plaintiff and she never warned him that he could face disciplinary action if he did not submit to an interview. [Id. at 14-15.] The Investigative Memorandum states that Plaintiff agreed to return to discuss the camera matter the day after he spoke to Inspector Hall, and Inspector Derwey testified that she and Inspector Hall waited for Plaintiff at their office the next day. Plaintiff, however, testified he told the postal inspectors that they should not count on him returning the next day because

⁷ Before he moved camera 14 on October 12, Plaintiff looked directly into the camera and smiled. [Initial Decision at 12.]

he needed his sleep. The AJ found Plaintiff's testimony on this issue to be more credible than Inspector Derwey's. Further, the AJ found that, when Plaintiff told Inspector Hall that he would return with a written statement the next day, Inspector Derwey misinterpreted the statement to be a reference to the camera investigation. The AJ noted that Inspector Derwey only came into the conversation between Plaintiff and Inspector Hall toward the end of the conversation. In addition, Plaintiff consistently questioned why he was never asked to give a statement about the cameras. The AJ found that it was reasonable for Plaintiff to believe that, after voluntarily raising the camera issue to the postal inspectors, he was free to abandon it. [Id. at 16-17.]

The AJ noted that a postal inspector attempted to contact Plaintiff through his supervisor on January 2, 2003, but the supervisor said that Plaintiff's attendance had been irregular and that Plaintiff was not available. Inspector Derwey testified that she believed they had been told Plaintiff was on workers' compensation leave prior to that time. Inspectors were told in April that Plaintiff was available, but they did not interview him because the Investigative Memorandum had been completed. [Id. at 15 & n.27.] Inspector Derwey testified that there were attempts to contact Plaintiff at his home, but the people at that number were uncooperative. Plaintiff testified that he had to move out of his mother's home because he struck

his sister during an altercation. The AJ accepted this explanation and noted that his mother's house was not his usual place of abode during the time in question. Further, it was not surprising that his mother and his sister were uncooperative in light of the circumstances that prompted Plaintiff to move out. [Id. at 14 & n.24.]

At the hearing before the AJ, Plaintiff raised the affirmative defenses of disability discrimination and harmful procedural error.⁸ Plaintiff alleged that, in finding that he failed to cooperate with the camera investigation, the deciding official improperly considered Plaintiff's work absences, which were allegedly due to a disability. The deciding official stated that he believed Plaintiff's poor work attendance contributed to the investigation's delay. The AJ found that Plaintiff failed to establish that he either was, or was considered to be, a disabled person. [Id. at 17-18.]

Plaintiff testified that he has cardiovascular hypertension and a cyclothymic disorder and that he has Department of Veteran Affairs ("VA") service-connected disability ratings for these conditions. He also underwent coronary artery

⁸ Plaintiff also raised a due process argument with regard to the failure to cooperate incident. The AJ did not consider this argument based upon the Agency's failure to prove that charge. [Initial Decision at 20.]

bypass grafting.⁹ He cannot lift more than fifty pounds and, for an unspecified period of time, he could not lift more than twenty-five pounds. Plaintiff takes medications for his conditions, and his conditions affect his life-style. He does not "party" and walks for exercise. He also testified that the Agency's medical officer is aware of his conditions. The AJ found that Plaintiff was not disabled because he did not establish that any of his major life activities are substantially limited, nor did he identify any jobs that he cannot do because of his restrictions. Further, Plaintiff did not present any evidence that the officials who proposed and decided his removal were aware of his conditions. For example, Mr. Sakagawa testified that Plaintiff's work absences were only part of the explanation for his failure to meet with the inspectors and were not part of the reason for removing him. The AJ therefore concluded that Plaintiff did not establish his affirmative defense of disability discriminated. [Id. at 18-20.]

Plaintiff also raised the following incidents of harmful procedural error: delay in disciplinary action; failure to provide the video tape; failure to obtain proper review before

⁹ Around 1998, Plaintiff suffered three heart attacks. Plaintiff also states that he has been diagnosed with depression and is taking Bupropion. Plaintiff had chest pains, premature ventricular contractions, and breathing episodes as often as once every couple of days from 1999 to the beginning of 2001. [Mem. in Opp. at 2-3.]

initiating disciplinary proceedings; and Mr. Sakagawa held his failure to appear against him after Mr. Sano told Plaintiff that Mr. Sakagawa did not want to see him. [Id. at 21-23.]

Plaintiff argued that the charges against him were untimely under the requirements of the collective bargaining agreement between the Agency and the American Postal Workers Union ("CBA"). The AJ, however, found that the CBA did not mention time limits on the imposition of discipline. Further, Plaintiff did not prove that he was prejudiced by the delay, nor did he show that the outcome would have been different if the proceedings had been timely. The AJ also noted that a delay in discipline can be excused if it is due to a delay in completing the investigation into the charges. [Id. at 21.]

Plaintiff further argued that the Agency should have provided the video tape to either Plaintiff or the proposing official prior to the day in court meeting. Plaintiff, however, never requested access to the video tape, and the proposing official relied upon the investigative report in framing the charges. The investigative report included a detailed description of the alleged incident, and the AJ noted that it was unlikely that viewing the video tape before the day in court meeting would have improved Plaintiff's recollection of the events. Even if the failure to provide the video tape was error, Plaintiff did not show how it affected the outcome, particularly

in light of the fact that Plaintiff admitted moving the cameras.
[Id. at 21-22.]

Plaintiff also alleges that the disciplinary procedures were improperly initiated because article 16.8 of the CBA states: "In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee." [Id. at 22.] Plaintiff apparently argued either that: 1) Mr. Sano was not his supervisor and Mr. Sugihara was; or 2) the Agency did not establish that Mr. Yokoyama was the designee of the installation head. The AJ noted that article 16.8 only applies to the imposition of discipline, not the initiation of disciplinary proceedings. Further, Mr. Sakagawa, the installation head, clearly concurred in the disciplinary action because he was the deciding official. [Id.]

Finally, Plaintiff argued that he did not appear before Mr. Sakagawa to present his defense because he asked Mr. Sano if Mr. Sakagawa wanted to see him and Mr. Sano said "No, not really." Mr. Sakagawa testified that Plaintiff's failure to appear was one of the factors that he considered. He wanted to meet with Plaintiff and he testified that, if Plaintiff "had been told not to appear, he believed that factor could be prejudicial to his case." The AJ found that Plaintiff's testimony on this issue was credible. The AJ, however, found that Mr. Sano's

statement was "an off-hand comment and does not appear to vitiate the proper notice given the appellant and does not violate any regulation or procedure." The AJ also noted that Plaintiff was a former union steward and it was unlikely that he would he would rely on such a casual comment without consulting his union representative. Further, Plaintiff did not show that the outcome would have been different if he had appeared before Mr. Sakagawa, particularly because the arguments that Plaintiff presented at the hearing before the AJ were the same ones that the union representative raised before Mr. Sakagawa on Plaintiff's behalf. [Id. at 23.] The AJ therefore concluded that Plaintiff failed to establish his affirmative defense of harmful procedural error. [Id. at 24.]

The AJ, however, found that Mr. Sakagawa's penalty determination did not warrant deference because Mr. Sakagawa did not properly consider the relevant mitigating factors. In determining the appropriate penalty, Mr. Sakagawa only considered the seriousness of the charge. He considered Plaintiff's length of service, but only to the extent that it affected Plaintiff's conduct. Based upon his own review, the AJ determined that removal was an appropriate penalty. The AJ noted the following factors: the seriousness of the charge; custodians' virtually unlimited access to the facility; and the expansion of Plaintiff's duties to include patrolling the perimeter of the

facility.¹⁰ In addition, the AJ noted the following mitigating factors: Plaintiff had more than twenty years of service with the Agency; he had no prior disciplinary actions; and there was no evidence that any untoward events occurred because Plaintiff moved the cameras.¹¹ [Id. at 24-25.] The AJ ultimately found that removal was "within the tolerable bounds of reasonableness" because Plaintiff breached the significant trust that the Agency places in its custodians. [Id. at 26.]

Plaintiff sought review before the full MSPB Board, which denied his petition for review on August 30, 2005, rendering the Initial Decision the MSPB's final decision in the matter. [SER at 61 (MSPB Final Order dated 8/30/05 at 2).] Plaintiff sought review of the final order by the United States Equal Employment Opportunity Commission ("EEOC"), Office of Federal Operations. On April 26, 2006, the EEOC issued its decision, concurring in the MSPB's final decision and finding no

¹⁰ The AJ noted that this factor cut both ways because, while it demonstrated that the Agency trusted its custodians, it also showed that the Agency treated Plaintiff inconsistently. The Agency expanded his duties after placing him on emergency suspension because he was a security threat. [Initial Decision at 25.]

¹¹ Although the four cameras could not record unusual events because they were out of position, there were more than twenty other security cameras and none of them recorded anything unusual during the time that the four cameras were out of position. [Initial Decision at 25.]

discrimination.¹² [Record on Appeal, Part I, Tab 11.]

III. The Instant Case

On May 26, 2006, Plaintiff filed his Employment Discrimination Complaint and Civil Service Appeal ("Complaint") in the instant case. The Complaint alleges the following claims: unlawful employment discrimination (hostile work environment), in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII" and "Count One"); disparate treatment discrimination based on his actual and perceived disability and his opposition to prohibited personnel practices, and subjection to a hostile work environment, in violation of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794a ("Rehabilitation Act"), and related Executive Orders ("Count Two"); review of the MSPB's decision pursuant to 5 U.S.C. § 7703 ("Count Three"). Count Three alleges that: removal was too harsh a penalty in light of his years of service and his status as a disabled veteran; the AJ failed to properly consider all mitigating factors; the AJ made an unnecessary and prejudicial credibility determination because there was no question that Plaintiff was not authorized to move the cameras; and the AJ's adverse credibility finding was unsupported. Plaintiff seeks: declaratory relief; compensatory damages, back

¹² Although the EEOC's decision is dated April 26, 2006, it is stamped "RECEIVED" by the MSPB on May 26, 2006.

pay, the restoration of sick and annual leave; attorney's fees and costs; and other appropriate relief.

A. MSPB Appeal

Plaintiff filed his Opening Brief on August 22, 2008. Plaintiff notes that Douglas v. Veterans Administration, 5 M.S.P.R. 280, 306 (1981), sets forth a non-exhaustive list of relevant factors to be considered in determining whether a penalty is appropriate. Not all factors are relevant in every case. Plaintiff argues that a proper analysis of the relevant factors reveals that removal was too harsh a penalty. Plaintiff also notes that MSPB decisions favor progressive discipline and that, under the CBA, discipline should be corrective rather than punitive. Plaintiff argues that his removal violates both principles.

Plaintiff further argues that the AJ failed to consider all of the applicable mitigating factors. Plaintiff complains that the AJ only considered four of the Douglas factors. For example, while Plaintiff concedes that the Agency probably never had other cases involving the movement of the security cameras prior to the incident, there must have been other charges of unauthorized conduct which allegedly compromised security. Thus, the AJ did not consider whether Plaintiff's penalty was consistent with the penalties in other similar cases. Plaintiff's offense was not a notorious incident, and it did not

harm the Agency's reputation. Further, Plaintiff expressed profound remorse. Plaintiff also stresses that the AJ apparently did not consider whether there were other lesser, but still effective, sanctions available.

Plaintiff notes that there were numerous instances where the AJ found him to be credible. The AJ, however, found that Plaintiff's explanation that he accidentally moved the cameras while trying to clean them was not credible. The AJ's credibility finding was not based on Plaintiff's demeanor during the hearing. Plaintiff therefore contends that the AJ's credibility finding is not supported by the record and is not entitled to deference.

In making his credibility finding, the AJ discussed the day in court meeting and noted that Plaintiff initially denied being the person in the video tape and denied knowing that he moved the cameras. Further, he did not mention receiving complaints about cobwebs, looking for a ladder to reposition the cameras, or telling a supervisor that he had moved the cameras. Plaintiff emphasizes that he did not see the video tape during the day in court meeting and the meeting consisted of having Plaintiff respond to paragraphs in the investigative memorandum. Thus, there was limited opportunity for Plaintiff to raise new information. Plaintiff also argues that the fact that the cameras moved on October 11 when he tried to clean them does not

mean that he could not have tried to clean them again on October 12. In between the two attempts, the cameras were repositioned and there were no complaints about their movement.

Plaintiff also argues that the AJ should not have relied on Mr. Sano's typewritten notes about the day in court meeting because they are double hearsay. Plaintiff argues that the notes are inaccurate because he never denied having moved the cameras. Plaintiff also argues that the AJ should not have considered the fact that the cameras did not show any movement while Plaintiff was allegedly trying to reposition them. The cameras are stop-frame, intermittent recording cameras, not continuous recording cameras. Further, the fact that they moved while he was trying to clean them does not necessarily mean that they would necessarily move while he tried to reposition them. Plaintiff also notes that Mr. Sano's and Mr. Petty's testimony showed that the cameras were loose. Finally, Plaintiff argues that there was no testimony to support the AJ's finding that Plaintiff intentionally moved the cameras. Plaintiff therefore argues that the Court should reverse the MSPB's decision and impose a less severe penalty.

Defendants filed their Answering Brief on September 23, 2008. Defendants argue that this Court should affirm the MSPB decision because removal is an appropriate remedy for the sustained charge. Defendants argue that the AJ's determination

is supported by substantial evidence. Although the AJ noted that the deciding official failed to consider certain Douglas factors, the AJ's own review of the Douglas factors yielded the same result. Defendants argue that the AJ's analysis of the Douglas factors was proper.

Defendants further argue that the AJ's adverse credibility determination was supported by substantial evidence. Defendants note that courts give great deference to an administrative law judge's credibility findings. The AJ pointed to specific evidence in the record which supported his finding and he was in the best position to make such findings. Defendants also argue that Plaintiff's arguments that his efforts to reposition the cameras would not have moved them and that a stop-frame recording camera would not have recorded his efforts to reposition the cameras are pure conjecture. Finally, Defendants note that hearsay is admissible in MSPB proceedings and may be considered sufficient evidence. Defendants therefore urge the Court to affirm the MSPB's finding that Plaintiff committed misconduct and to find that the removal decision was not arbitrary and capricious.

Plaintiff filed his Reply Brief on October 6, 2008. Plaintiff argues that there is no support for the AJ's finding that Plaintiff went through training and was informed that he was not to clean the cameras. There is no evidence in the record

that Plaintiff, or any other custodian, was instructed not to clean the cameras. The record only indicates that the training occurred during a "Stand up" meeting. [SER at 96 (4/15/03 Notice of Proposed Removal at 2).] It was therefore a brief meeting where all employees were addressed as a group. It was not an extended training for custodians.

Plaintiff also argues that the AJ and Defendants improperly characterize the day in court meeting as an agency hearing. It was merely pre-disciplinary questioning where Mr. Sano questioned Plaintiff about the first twenty-three paragraphs of the Investigative Report. Plaintiff could not ask questions, did not get to see the video tape, and not get an advance copy of the Investigative Report. Mr. Sano did not ask any questions apart from the report. Plaintiff did not have the opportunity to mention things like complaints about the cobwebs or birds, but the AJ held his failure to do so against him.

With regard to the typewritten notes that Mr. Sano made about the day in court meeting, Plaintiff notes that Mr. Sano prepared them at an unspecified time after the meeting. Plaintiff concedes that hearsay is admissible, but he argues that it should not be considered in a vacuum. The AJ should have explained why he found the notes to be credible. Plaintiff complains that the typewritten notes were not made under oath and Defendants never produced Mr. Sano's handwritten notes taken

during the meeting. The AJ stated that the typewritten notes were contemporaneous, but Plaintiff argues that was only an assumption. Plaintiff therefore argues that the typewritten notes cannot be considered reliable evidence of Plaintiff's statements at the day in court meeting.

B. Motion for Summary Judgment

In the Motion, Defendants argue that Plaintiff cannot establish a prima facie case of disparate treatment disability discrimination because there is no evidence that he is disabled for purposes of the Rehabilitation Act. There is no indication that Plaintiff's physical ailments limit his major life activities. Defendants also argue that there is no evidence that Plaintiff was removed because of his disability. Defendants assert that Plaintiff's removal was based solely upon his movement of the security cameras, which was a breach of trust. Moreover, there is no evidence that Mr. Yokoyama and Mr. Sakagawa even knew about Plaintiff's disability.

Defendants also argue that Plaintiff cannot establish a prima facie case of hostile work environment because Plaintiff was removed for his misconduct. Further, there is no evidence that anyone in the Agency's management was motivated by Plaintiff's disability.

Plaintiff filed his memorandum in opposition to the Motion on October 23, 2008. Plaintiff states that his conditions

caused him to: need light duty; take many daytime hours off to attend rehabilitation and therapy sessions; and frequently miss work altogether. He was unofficially granted accommodations for this through liberal use of his sick and annual leave and leave without pay. He was also granted a schedule change in 2002. During 2002, Plaintiff frequently called in sick, sometimes twice a week, pursuant to medical advice because of elevated blood pressure readings. Plaintiff did not have any problems related to his leave until the time period at issue in this case.

The proposing official, Mr. Sano, testified during his deposition that he was aware that Plaintiff changed schedules to "go to something for his health." [Mem. in Opp, Decl. of Elbridge W. Smith ("Smith Decl."), Exh. 2 (Excerpts of Trans. of 9/25/03 Depo. of Eugene Sano) ("Sano Depo.") at 9.] He was also aware that Plaintiff had a zero, or near zero, leave balance because he had a health problem. [Id. at 44.] Mr. Sano stated that from October 2002 to March 2003, Plaintiff "hardly came to work." [Id. at 70.] Before deciding to propose removal, Mr. Sano reviewed Plaintiff's attendance record, but he testified that it had "nothing to do with" his decision. [Id. at 71.]

The deciding official, Mr. Sakagawa, testified during his deposition that Plaintiff was absent more than necessary, even if the absences were legitimate. Mr. Sakagawa acknowledged that Plaintiff may have had personal problems, but Mr. Sakagawa

was not specifically aware of any. When asked to evaluate Plaintiff's performance, Mr. Sakagawa said that it was poor because of his attendance and the incident in question. [Smith Decl., Exh. 3 (Excerpts of Trans. of 9/24/03 Depo. of Glen Sakagawa) ("Sakagawa Depo.") at 36-39.] When asked about Plaintiff's disciplinary record, Mr. Sakagawa testified that it was not good because Plaintiff did not have a leave balance, despite his many years of service. [Id. at 68.] Mr. Sakagawa also testified that he did not consider any mental impairments, personality problems, or job tensions as mitigating factors in this case. [Id. at 85.]

At issue in the Motion is whether Plaintiff's removal was motivated by discriminatory animus because of his medically necessary work absences. Plaintiff argues that summary judgment is not appropriate because there are genuine issues of fact. Plaintiff contends that Mr. Sakagawa did not consider lesser penalties because he regarded Plaintiff as having a poor disciplinary record due to his absences. Plaintiff, however, had no prior disciplinary problems in his twenty-one years of service. Plaintiff also argues that the increase in his job responsibilities after his suspension is inconsistent with the allegation that he breached the Agency's trust. Plaintiff argues that issues of intent or motivation are generally inappropriate for summary judgment because they are issues of fact.

Plaintiff contends that he has established a prima facie case of disparate treatment. He is disabled; he is qualified to do his job (with or without reasonable accommodation); and he suffered adverse employment action because of his disability. Plaintiff argues that Defendants have never disputed his claim that he has hypertension, cardiovascular disease, and depression. These impairments substantially limit one or more of his life activities. Further, Defendants have never contested Plaintiff's claim that he is qualified to do his job, in spite of his poor attendance for medical reasons. There is no evidence in the record that Plaintiff's superiors ever objected to Plaintiff's medical absences, nor is there evidence that Plaintiff's job performance, apart from the incident in question, was unsatisfactory.

Plaintiff argues that, under Ninth Circuit case law, all that is required to prove the "because of" element is that animus based on his disability or based on a request for accommodation be a motivating factor in his removal. Plaintiff emphasizes that Mr. Sakagawa testified that he considered Plaintiff's absences to be excessive and that he believed Plaintiff had a poor disciplinary record because of his absences. Plaintiff contends that this is sufficient to create a genuine issue of material fact as to discriminatory intent. Plaintiff argues that the Agency unofficially accommodated Plaintiff's

disability by allowing him liberal leave usage, but Mr. Sakagawa used that accommodation to justify Plaintiff's removal. Plaintiff therefore argues that this Court should deny the Motion.

Defendants filed their reply on October 30, 2008. Defendants argue that the Court should dismiss Plaintiff's claims because he cannot establish the "because of" element. Although both Mr. Sano and Mr. Sakagawa reviewed Plaintiff's attendance, it did not motivate their decisions. Defendants argue that the Notice of Proposed Removal states that "Since October 23, 2002 you have been irregular in attendance and you have not made any attempt to return to the Inspection Service office for an interview." [SER at 96.] Defendants argue that this shows that Mr. Sano only considered Plaintiff's attendance to determine if Plaintiff was able to cooperate in the investigation. They also point out that Mr. Sakagawa only considered Plaintiff's attendance record after the union steward approached him about a last chance agreement. [Reply, Decl. of Edric M. Ching, Exh. J (Excerpts of Trans. of 9/24/03 Depo. of Glen Sakagawa) at 34-35.] Defendants argue that this and any other attempts to settle the matter should be deemed inadmissible pursuant to Federal Rule of Evidence 408.

In addition, Defendants argue that it was proper for Mr. Sakagawa to consider Plaintiff's attendance and job

performance as part of the Douglas analysis. Mr. Sakagawa asked the union representative to provide him with mitigating information, including factors like good conduct, reporting on time, and quality work product. Mr. Sakagawa ultimately concluded that Plaintiff's work quality and attendance were poor. Defendants also argue that there is no evidence that either Mr. Sano or Mr. Sakagawa considered times in which Plaintiff requested reasonable accommodations, such as light duty or change in schedule. Defendants contend that Mr. Sakagawa only considered Plaintiff's attendance in determining whether a lesser penalty would be appropriate and that such consideration was proper. Mr. Sakagawa expressly testified that he did not fire Plaintiff for poor attendance. [Defs.' CSOF, Exh. B (Excerpts of Trans. of 10/20/03 MSPB hearing) ("Hearing Trans.") at 89.] Defendants also note that there is no evidence that Plaintiff's absences after the incident in question were caused by the same conditions that prompted his request for a schedule change. Further, there is no evidence that Plaintiff and the Agency had any kind of interactive process concerning his requests for medical-related absences.

Even assuming, *arguendo*, that Plaintiff established a prima facie case, Defendants argue that Plaintiff failed to establish that Defendants' legitimate, non-discriminatory reason for his removal was pretextual. Defendants note that Plaintiff

does not deny that he moved the cameras and that the MSPB found that the sustained charge was sufficient to support removal. Defendants argue that it is clear that Mr. Sano's and Mr. Sakagawa's actions were based on Plaintiff's movement of the cameras and Plaintiff's failure to cooperate with the investigation. Plaintiff provided no evidence that they did not honestly believe the reasons for the recommendation and decision. Defendants argue that, even if the removal decision was ultimately wrong, that alone does not establish pretext.

Defendants point out that Plaintiff failed to address his hostile work environment claim in his opposition to the Motion. They argue that this precludes him from presenting any evidence on the issue and therefore, this Court must dismiss the claim.

STANDARD

Although MSPB decisions generally must be appealed to the Federal Circuit Court of Appeals, district courts have jurisdiction to hear "mixed" cases, *i.e.* cases involving both a MSPB appeal and a discrimination claim. See Coons v. Sec'y of United States Dep't of Treasury, 383 F.3d 879, 884 (9th Cir. 2004); see also 5 U.S.C. § 7703(b)(2).

I. MSPB Appeal

In ruling upon Plaintiff's MSPB appeal, this Court must review the record and hold unlawful and set aside any agency action, findings, or conclusions found

to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

5 U.S.C. § 7703(c). Thus, in reviewing the MSPB's decision, this Court must determine whether the MSPB applied the correct legal standards, and whether its findings are supported by substantial evidence. See Washington v. Garrett, 10 F.3d 1421, 1428 (9th Cir. 1993); see also Lawrence v. Dep't of Interior, 525 F.3d 916, 920 (9th Cir. 2008) (stating that the Court of Appeals applies the same standard of review to the MSPB's decision as the district court does). "Substantial evidence means more than a mere scintilla, but less than a preponderance." Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990) (citations and quotation marks omitted). The Court must consider both the evidence in the record that supports the MSPB's decision and the evidence that undermines it. See Washington, 10 F.3d at 1428. This Court, however, must not reverse the AJ's decision "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." Universal Camera Corp. v. N.L.R.B., 340 U.S.

474, 488 (1951).

II. Motion for Summary Judgment

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

Fed. R. Civ. P. 56(c). The moving party bears the initial burden of establishing that there is no genuine issue of material fact.

See MetroPCS, Inc. v. City & County of San Francisco, 400 F.3d

715, 720 (9th Cir. 2005). There is no genuine issue of material

fact if, based on the record as a whole, a rational trier of fact

could not find for the non-moving party. See Matsushita Elec.

Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

"A material fact is one that may affect the decision, so that the finding of that fact is relevant and necessary to the

proceedings." W. Sunview Props., LLC v. Federman, 338 F. Supp.

2d 1106, 1114 (D. Haw. 2004) (citing Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 248 (1986)).

If the moving party meets its burden, the non-moving party must then present evidence that there is a genuine issue of material fact for trial. In considering a motion for summary judgment, a court must resolve all disputed issues of fact in favor of the non-moving party. See MetroPCS, 400 F.3d at 720.

Further, "[i]n ruling on a motion for summary judgment, the court

must bear in mind the actual quantum and quality of proof necessary to support liability under the applicable law." W. Sunview, 338 F. Supp. 2d at 1114 (citation omitted). "[S]ummary judgment is mandated if the non-moving party 'fails to make a showing sufficient to establish the existence of an element essential to that party's case.'" Broussard v. Univ. of Cal. at Berkeley, 192 F.3d 1252, 1258 (9th Cir. 1999) (quoting Celotex, 477 U.S. at 322).

A. Disparate Treatment Disability Discrimination Claim under the Rehabilitation Act

The standards applicable under the Americans with Disabilities Act ("ADA") apply to Plaintiff's disability discrimination claims under the Rehabilitation Act. See Coons, 383 F.3d at 884 (citing 29 U.S.C. § 794(d)) (some citations omitted). In order to establish a prima facie case of disparate treatment disability discrimination under the ADA, Plaintiff must prove that: 1) he is a person with a disability under the ADA; 2) he is a qualified individual who can perform the essential functions of his job, with or without reasonable accommodations; and 3) he suffered an adverse employment action because of his disability. See Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1133 (9th Cir. 2001).

In determining whether Plaintiff was discriminated against because of his disability, this Court must apply the two-pronged scheme set forth by the Second Circuit and adopted by the

Ninth Circuit. See Mustafa v. Clark County Sch. Dist., 157 F.3d 1169, 1175 (9th Cir. 1998).

Under this scheme, if the employer disclaims any reliance on the employee's disability in having taken the employment action, McDonnell Douglas Title VII disparate impact analysis should be used to determine if the employer's reason is pretextual. Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511, 514-16 (2d Cir.1991), citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). On the other hand, if the employer acknowledges reliance on the disability in the employment decision, the employer bears the burden of showing that the disability is relevant to the job's requirements. Id. at 514-515.

Id. at 1175-76. In the present case, Defendants deny any reliance on Plaintiff's asserted disability in the decision to remove him. Thus, assuming that Plaintiff can establish a prima facie case, to survive Defendants' motion for summary judgment, Plaintiff bears the burden of raising "a triable issue of fact as to pretext". See Noyes v. Kelly Servs., 488 F.3d 1163, 1165 (9th Cir. 2007).

**B. Hostile Work Environment
Claim under the Rehabilitation Act**

In order to establish a prima facie case of hostile work environment disability discrimination, Plaintiff must show that: 1) Defendants subjected him to unwelcome conduct; 2) the conduct was based on his disability; and 3) "the conduct was sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment." Surrell

v. Cal. Water Serv. Co., 518 F.3d 1097, 1108 (9th Cir. 2008) (citation omitted). It is not enough that a plaintiff subjectively perceives the working environment as abusive; the environment must also be objectively perceived as abusive. See Craig v. M & O Agencies, Inc., 496 F.3d 1047, 1055 (9th Cir. 2007). "Objective hostility is determined by examining the totality of the circumstances and whether a reasonable person with the same characteristics as the victim would perceive the workplace as hostile." Id. (citation omitted).

DISCUSSION

I. MSPB Appeal

In his appeal of the MSPB's decision, Plaintiff raises the following points of error: 1) the AJ should not have made a determination as to Plaintiff's credibility because it was not required to uphold the specification of unauthorized repositioning of the security cameras;¹³ 2) the AJ's adverse credibility finding did not have a sufficient factual basis; 3) the AJ failed to consider all of the applicable mitigating factors; and 4) the penalty of removal was too harsh.

A. Credibility

Plaintiff first argues that the AJ should not have made a credibility determination in upholding the charge of

¹³ Insofar as the MSPB denied Plaintiff's petition for review and the Initial Decision became the final decision of the Board, this Court must review the Initial Decision.

unauthorized repositioning of the security cameras because it did not require a finding of intent. Plaintiff did not dispute that he moved the cameras and that he was not authorized to do so. Thus, the AJ did not need to assess the credibility of Plaintiff's testimony about the circumstances surrounding the movement of the cameras. [Initial Decision at 10 ("I do not find the appellant's testimony concerning the movement of the cameras to be credible.").] Plaintiff argues that this error was prejudicial because the AJ used the adverse credibility determination to justify a more severe penalty than would have been warranted otherwise. Plaintiff's argument is misplaced.

The AJ noted that Plaintiff was charged with "unauthorized repositioning of four security cameras on October 12, 2002" and with failing to cooperate with the official investigation thereof.¹⁴ [Initial Decision at 7.] First, Plaintiff acknowledges that numerous credibility determinations and observations were part of the AJ's decision not to sustain the failure to cooperate charge. [Opening Brief at 30.] Plaintiff, however, apparently contends that the AJ should have ignored any credibility concerns regarding the unauthorized movement charge because, in Plaintiff's view, it is essentially a strict liability offense. Even assuming, *arguendo*, that the

¹⁴ There was one charge of unacceptable conduct with two specifications. [SER at 95.]

adverse credibility finding was unnecessary to sustain the charge, whether Plaintiff intentionally moved the cameras was certainly relevant to the AJ's ruling on the appropriate penalty for the offense. Thus, the credibility of Plaintiff's testimony regarding the movement of the cameras was relevant, and the AJ did not err in considering Plaintiff's credibility as to that charge.

Further, the Agency's May 9, 2003 Letter of Decision - Removal stated that Plaintiff's offense was "deliberately repositioning four security video cameras[.]" [SER at 86.] Thus, insofar as the Agency's ultimate decision to remove Plaintiff was based on a finding that he deliberately moved the cameras, it was proper for the AJ to determine the credibility of Plaintiff's testimony about whether the movement was deliberate.

Plaintiff next argues that the record does not support the AJ's finding that his testimony about the movement of the cameras was not credible.

An ALJ's findings as to credibility are entitled to considerable deference. But "[w]hile it is true that ordinarily the question of credibility is left to the [ALJ], this is not an inflexible rule and will not be enforced if the credibility determination is inherently improbable or discredited by undisputed fact."

Washington, 10 F.3d at 1430 (quoting Grubka v. Department of the Treasury, 858 F.2d 1570, 1574 (Fed. Cir. 1988) (reviewing MSPB decision)) (some citations omitted) (alterations in original).

In making this adverse credibility finding, the AJ first noted that, during the day in court meeting, Plaintiff initially denied knowing that he moved the cameras while trying to clean them.¹⁵ [Initial Decision at 10.] This is inconsistent with the following portions of Plaintiff's testimony before the AJ: after the cameras moved while Plaintiff was trying to clean them, he looked for a ladder to reposition them; after camera 3 moved, he got a broom with longer bristles to try to reposition it; when he accidentally moved camera 14, it swung so much that he thought it would fall; and that he may have told another employee that the cameras were out of position. [Id. at 9.] The AJ stated that he thought it was "highly unlikely that the appellant's memories of these events would have improved with the passage of time." [Id. at 10.] The AJ also stated that it was "inherently incredible" that an employee who accidentally moved two cameras one day would return the next day and repeat his actions four more times. [Id.] This Court agrees with the AJ. The AJ also noted that the videotape from camera 14 showed that Plaintiff "us[ed] considerable force and appear[ed] to be striking at the camera, rather than merely dusting cobwebs." [Id. at 11.] Further, although Plaintiff claimed that one of the

¹⁵ The AJ also noted that Plaintiff denied that he was the person in the videotape, but the AJ gave this little weight because Plaintiff did not have access to the tape during the day in court meeting and Plaintiff was only responding to a description of the tape. [Initial Decision at 10 n.19.]

cameras swung violently after he accidentally moved it, none of the videotapes show significant movement once the camera was out of position. Plaintiff argues that the movement would not appear on the videotape because the cameras use a time-lapse filming method instead of a real-time filming method. The AJ considered this argument and rejected it. [Id. at 11 & n.22.] Finally, the AJ noted that the videotapes from other cameras show that Plaintiff was only in the vicinity of the repositioned cameras "for a very brief period of time, which is not consistent with trying to reposition a camera after accidentally moving it." [Id. at 11-12.] Thus, the AJ identified specific reasons for his adverse credibility finding and, based on this Court's review of the record, the Court finds that the AJ's reasons are supported by the record.

Plaintiff also argues that the AJ's adverse credibility finding is not supported by the record because the AJ found Plaintiff to be credible in every other instance. That fact alone, however, does not mean that the adverse finding was erroneous. In fact, the single adverse finding amongst the other favorable credibility findings indicates that the AJ carefully considered Plaintiff's credibility on each subject and made separate decisions based on the facts of each subject, rather than making a generalized credibility finding on the record as a whole.

This Court cannot find that the AJ's adverse credibility finding is inherently improbable or discredited by undisputed fact. The AJ did not commit reversible error in making an adverse credibility finding as to Plaintiff's testimony about the movement of the cameras.

B. Mitigating Factors

Plaintiff next argues that the AJ committed reversible error because he failed to consider all of the applicable mitigating factors. An agency must generally follow its own precedential decisions. See McClaskey v. United States Dep't of Energy, 720 F.2d 583, 587 (9th Cir. 1983) (citing Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade, 412 U.S. 800, 807-08 (1973)) (some citations omitted). In Douglas v. Veterans Administration, the MSPB articulated a number of factors that are generally relevant when determining whether a penalty is appropriate:

(1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

(3) the employee's past disciplinary record;

(4) the employee's past work record, including length of service, performance on the

job, ability to get along with fellow workers, and dependability;

(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(7) consistency of the penalty with any applicable agency table of penalties;

(8) the notoriety of the offense or its impact upon the reputation of the agency;

(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

(10) potential for the employee's rehabilitation;

(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

5 M.S.P.R. 280, 305-06 (1981). These factors are not exhaustive, and not all of the factors will apply in every case. See id.

Thus, the MSPB is not required to consider all of the factors in every case; it need only consider the relevant factors.

See McClaskey, 720 F.2d at 588 (citing Nagel v. Department of Health and Human Services, 707 F.2d 1384, 1386 (Fed. Cir.

1983)).]

The board never intended that each factor be applied mechanically, nor did it intend mandatory consideration of irrelevant factors in a particular case, or that it should be reversible error not to state expressly that a factor was considered and found irrelevant. . . . [T]he *Douglas* decision correctly states that neither statute nor regulation requires an agency to demonstrate that it considered all mitigating factors.

Nagel, 707 F.2d at 1386 (emphasis in original).

The AJ clearly applied Douglas. In fact, he found that the Agency's decision to impose removal was not entitled to deference because Mr. Sakagawa did not properly consider mitigating factors. The AJ, however, based on his own review, concluded that removal was reasonable. [Initial Decision at 24-25.] Although he did not list the Douglas factors, the AJ expressly considered the following fact that are relevant to the Douglas factors:

- the seriousness of the offense (factor 1);
- the trust put in custodians and their virtually unlimited access to the facility and the fact that such access is broader than the access allowed to other non-management personnel (factors 1 and 2);
- Plaintiff deliberately moved the cameras (factor 1);
- Plaintiff moved four cameras on the date in question after moving two the day before and after one of the four allegedly swung so violently that he thought it would fall (factor 1);
- Plaintiff's years of service (factor 4); and
- the lack of any prior disciplinary record (factor 3).

[Initial Decision at 10, 25.] In this Court's view, the AJ's emphasis on the trust placed in custodians and Plaintiff's breach

of that trust is relevant to Plaintiff's ability to perform his job at a satisfactory level and to the employer's confidence in Plaintiff (Douglas factor 5). Plaintiff's position is that he accidentally moved the cameras while attempting to clean them and he testified that he would never try to clean the security cameras again. Even accepting Plaintiff's position, his failure to realize the possible ramifications of his actions could indicate that he may have other lapses of judgment in the future that would breach the trust placed in custodians, with potentially serious consequences. This would affect his ability to perform his job at a satisfactory level and the employer's confidence in him. It arguably also indicates that rehabilitation may not be possible and that lesser sanctions may not be warranted (Douglas factors 10 and 12).

There is no indication that other Agency employees have committed the same or similar offense, or that there is an applicable table of penalties. Thus, consistency with these (Douglas factors 6 and 7) was not relevant and the AJ did not have to consider those factors. If there were other offenses or an agency table, Plaintiff did not point them out in the instant appeal.¹⁶ Plaintiff points only to the applicable CBA, which

¹⁶ The Court notes that the Supervisor's Worksheet for Disciplinary Action, signed by Eugene Sano on April 8, 2003, states that there were no similar offenses involving other employees. [SER at 101.]

states a general principle that discipline should be corrective rather than punitive. This, however, does not rise to the level of a table of penalties.

Plaintiff's offense was not notorious and there is no indication that it affected the Agency's reputation. Thus, Douglas factor 8 could be seen as favoring mitigation. Lapses in the Agency's security surveillance system, however, could adversely affect the Agency's reputation. Insofar as Factor 8 can be construed in favor of Plaintiff and against him, it could be seen as a neutral factor.

Douglas factor 9 can also be seen as neutral. There was evidence that all employees were informed of the new security system during a February 16, 2001 meeting and that Plaintiff attended that meeting. However, there was no evidence of exactly what the employees were told about the new system.

Plaintiff does not contend that Douglas factor 11 was a relevant factor that the AJ should have considered. [Opening Brief at 25-29 (discussing Douglas factors that the AJ failed to consider).] Further, there is no evidence in the record of "unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter[,]" see Douglas, 5 M.S.P.R. at 305, which contributed to the offense.

Based on this Court's review of the record and the

relevant Douglas factors, the Court finds that there was no reversible error in the AJ's, and ultimately the MSPB's, discussion of the factors that it deemed relevant.

C. Disproportionate Penalty

Plaintiff argues that the penalty of removal was too harsh in light of his status as a disabled veteran, his twenty-one years of service, and the fact that this was his first offense of any kind. The scope of a district court's review of the penalty imposed by the MSPB is very narrow. See Filiberti v. Merit Sys. Protection Bd., 804 F.2d 1504, 1510 (9th Cir. 1986). The court must defer to the MSPB's judgment in selecting an appropriate penalty "unless the penalty is so disproportionate to the offense as to constitute an abuse of discretion." Morales v. Merit Sys. Protection Bd., 932 F.2d 800, 802 (9th Cir. 1991). Where the challenged penalty is dismissal, the employee must establish that the offense he committed was minor. See id. (citing McClaskey v. United States Dept. of Energy, 720 F.2d 583, 586 (9th Cir. 1983)).

The AJ sated that "[t]he unauthorized movement of security cameras is a serious matter[,]" and that Plaintiff's interference with the security system breached the trust that the Agency places in its custodians, who have virtually unlimited access to the facility. [Initial Decision at 25-26.] This Court agrees. Plaintiff argues that his offense was minor because

there is no evidence that he moved the cameras as part of some nefarious plan and there is no evidence that anything untoward happened while the cameras were out of position. Even if this Court accepted Plaintiff's innocent explanation for his movement of the cameras, that does not minimize his offense. He intentionally attempted to clean the cameras even though he knew or should have known, based on his experience the day before, that it would cause the cameras to change position. His intentional actions left four security cameras out of position, "prevent[ing] the monitoring and taping of the entrances and exits." [SER at 86.] This "compromised the security system" at the facility, "prevented the Postal Service from satisfactorily performing due diligence in monitoring and preventing acts of terror and violence against its employees", and "compromised the safeguarding of mail and postal assets." [Id.] That none of these potential dangers happened that day was fortunate; it does not render Plaintiff's offense minor.

While Plaintiff's twenty-one years of service, veteran status, and lack of a prior disciplinary record could have been found to outweigh his offense, this Court cannot find that the penalty of removal was so disproportionate to Plaintiff's offenses of unauthorized movement of the security cameras as to constitute an abuse of discretion. Cf. Morales, 932 F.2d at 802 (stating that the plaintiff "could have been going through a bad

patch; his long service could have been found to outweigh his recent difficulties. But neither the district court nor we could say that there was an abuse of discretion in the drastic penalty applied.").

Plaintiff also argues that his removal violated the requirement of progressive discipline. Plaintiff first argues that progressive discipline is "an established preference in federal employment." [Opening Brief at 22 (citing Bolling v. Dep't of the Air Force, 9 M.S.P.R. 335, 340 (1981)).] Although the MSPB in Bolling noted that the offense at issue was the employee's fifth disciplinary offense in two years, including a prior offense that was the same as the offense at issue, and that lesser penalties had been ineffective, nothing in Bolling expressly establishes a requirement of, or even a preference for, progressive discipline in all federal employment. See 9 M.S.P.R. at 341-42.¹⁷ The Ninth Circuit has noted that the specifics of an employer's adoption of a progressive discipline principle "are a matter of choice, custom, or bargaining, not judicial

¹⁷ The Court notes that the MSPB has cited Bolling for the "the established preference for progressive discipline in Federal employment." See Cosgrove v. Dep't of Navy, 59 M.S.P.R. 618, 624 (1993) (citing Bolling, 9 M.S.P.R. at 340). Even assuming, *arguendo* that Bolling does set forth such a preference, the preference does not constitute an unequivocal prohibition of removal as a penalty for a first offense.

prescription from an empty record.”¹⁸ McClaskey, 720 F.2d at 588 n.2.

Plaintiff argues that the applicable CBA “acknowledges that ‘a basic principle shall be that discipline should be corrective in nature, rather than punitive.’” [Opening Brief at 22 (quoting Collective Bargaining Agreement, Record on Appeal, Part III (dkt. no. 39-7), Vol. 2, Tab 25 (“Collective Bargaining Agreement”), Article 16, Section 1).] The Court first notes that the Record on Appeal does not contain the entire text of Article 16.1. The Record on Appeal contains only the following portion of Article 16.1: “In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to” [Collective Bargaining Agreement at 109.] The next page is not included in the Record on Appeal. This Court cannot find that this portion of Article 16.1 imposes a requirement that the Agency impose progressive discipline before discharging an employee for just cause. In the present case, the Agency had just cause to remove Plaintiff. Thus, there is no indication that Plaintiff’s removal violated the CBA.

¹⁸ The Ninth Circuit made this observation in rejecting the dissenting opinion’s argument that dismissal should only be imposed for the most serious offenses and only after lesser penalties have been ineffective. See McClaskey, 720 F.2d at 588 n.2.

This Court therefore finds the AJ, and ultimately the MSPB, applied the correct legal standards and that their findings are supported by substantial evidence. They did not commit reversible error in affirming the Agency's decision to remove Plaintiff. The MSPB's decision is therefore AFFIRMED.

II. Motion for Summary Judgment

A. Rehabilitation Act - Disparate Treatment Claim

1. Prima Facie Case

Under the ADA, a person has a disability if he: "(1) has a physical or mental impairment that substantially limits one or more of [his] major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment." Coons, 383 F.3d at 884 (citing 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g)) (some citations omitted).

Plaintiff argues that he is disabled because he has hypertension, cardiovascular disease, and depression. [Mem. in Opp., Decl. Russell D. Henion ("Henion Decl.") at ¶ 3.] He had three heart attacks in and around April 1998 and underwent triple bypass surgery. As a result of his hypertension and cardiovascular disease, his circulatory system is substantially impaired. Plaintiff states that, between 1998 and the beginning of 2003, he suffered chest pains, premature ventricular contractions, and breathing episodes as often as once every couple of days. He also experienced dizziness, shortness of

breath, fatigue, and headaches. Plaintiff's physician instructed him to lay down until his symptoms subsided and his blood pressure stabilized. Plaintiff's physician restricted him from walking more than twenty minutes at a time, lifting heavy items, climbing, or doing any activity that requires him to be high off of the ground. Plaintiff states that he was frequently absent from work because of his medical conditions, often twice per week, and sometimes more. Plaintiff therefore exhausted all of his sick leave and annual leave and was frequently on leave without pay status. [Id. at ¶¶ 8-11, 13-14.] Plaintiff takes Bupropion for his depression. [Id. at ¶ 4.] His depression causes him to experience

symptoms of anxiety, social withdrawal from friends and family, depressed mood, feelings of hopelessness, sleeplessness, increased irritability, fatigue, reduced focus and concentration and reduced libido, loss of interest in formerly pleasurable activities such as diving, dancing, body surfing, spear fishing, tennis, soccer, coaching and officiating soccer games . . . , camping, Den Leader for Cub (sic) Scouts and walking outdoors with family members.

[Id. at ¶ 12.] Plaintiff asserts that he never needed to formally request accommodation for his disability. The Agency allowed him time off when he was symptomatic and placed him on light duty status beginning in October 1998. [Id. at ¶ 15.] He also testified that around the summer of 2002, he received a change in his work schedule to allow him to attend physical therapy appointments related to his cardiac rehabilitation.

[Smith Decl., Exh. 1 (Excerpts of Trans. of 9/25/03 Depo. of Russell D. Henion) ("Henion Depo.") at 38.]

At the hearing on the Motion, counsel for Defendants conceded that the Agency granted Plaintiff accommodations for his disability by granting him light duty status and by allowing him to change his work schedule to allow him to attend various appointments related to his condition.¹⁹ Defendants, however, deny Plaintiff's claim that the Agency granted him an accommodation by allowing him liberal use of leave. Based on counsel's representation, the Court finds, for purposes of the instant Motion, that Plaintiff is a person with a disability under the ADA.

Further, there is no evidence in the record that Plaintiff is not qualified to perform the essential functions of his position.²⁰ This Court therefore finds, for purposes of the instant Motion, that Plaintiff is qualified to perform the essential functions of his position with or without a reasonable

¹⁹ The Court notes that Plaintiff's assignment to light duty was apparently a permanent accommodation, [Henion Decl. at ¶ 15,] but the schedule change was temporary. [Sano Depo. at 9.]

²⁰ The Court notes that the Letter of Decision emphasizes that Plaintiff's custodial position was a position of trust and that Plaintiff's conduct removed the Agency's confidence in his ability to perform his duties. [Defs.' CSOF, Exh. A at 1.] Although this is arguably evidence that the Agency did not consider Plaintiff qualified to perform his duties, insofar as it relates to the unauthorized movement of the security cameras, the Court considers this as part of Defendants' proffered legitimate, non-discriminatory reason for Plaintiff's removal.

accommodation. The crux of the Motion is whether Plaintiff has raised a triable issue of fact as to whether he was removed because of his disability.

The Ninth Circuit has held that the ADA's "because of" language does not require that the plaintiff's disability have been the sole cause of discriminatory conduct. Where the evidence could support a finding that discrimination was one of two or more reasons for the adverse employment decision, at least one of which may have been legitimate, the plaintiff need only prove that his disability was a motivating factor. See Head v. Glacier Nw. Inc., 413 F.3d 1053, 1065-66 (9th Cir. 2005).

Eugene Sano, the proposing official, acknowledged that he knew Plaintiff had a zero, or near zero, leave balance. Mr. Sano, however, also testified that he did not consider Plaintiff's leave use to be abusive because he knew Plaintiff had health problems. [Sano Depo. at 44.] Mr. Sano acknowledged that he looked at Plaintiff's poor attendance record from October 2002 to March 2003 before recommending Plaintiff's removal. [Id. at 70-71.] The remainder of Mr. Sano's testimony on the issue, however, clearly shows that he considered Plaintiff's attendance in the context of the failure to cooperate charge. Mr. Sano testified that during those months, there was no time that he could have asked Plaintiff whether he attempted to return to give the inspectors a statement about the camera investigation. [Id.

at 72.] The Notice of Proposed Removal itself only discusses Plaintiff's attendance in the context of his cooperation with the investigation. [SER at 96 ("Since October 23, 2002 you have been irregular in attendance and you have not made any attempt to return to the Inspection Service office for an interview.").] This Court therefore finds that there is no evidence that Plaintiff's disability was a motivating factor in the decision to propose his removal.

Mr. Sakagawa, the deciding official, testified that he believed Plaintiff had a poor attendance record and that he believed Plaintiff was absent more than necessary. Mr. Sakagawa acknowledged that there may be legitimate excuses, but he stated that the bottom line is that, when a person is absent, someone else has to perform that person's duties. [Sakagawa Depo. at 36-37.] Mr. Sakagawa also testified that he believed that Plaintiff's past disciplinary record was not good because he had a zero leave balance in spite of his many years of service. Mr. Sakagawa, however, testified during his deposition that he did not consider Plaintiff's disciplinary record in deciding to remove Plaintiff. [Id. at 68.] He also testified during the hearing before the AJ that he did not fire Plaintiff for poor attendance. [Hearing Trans. at 89.] The Letter of Decision itself makes no reference to Plaintiff's poor attendance. [Defs.' CSOF, Exh. A.]

Further, even if Mr. Sakagawa did consider Plaintiff's poor attendance record in his decision to remove Plaintiff, there is no evidence that this amounted to a consideration of Plaintiff's disability. First, although Plaintiff claims that the Agency granted him an unofficial accommodation for his disability consisting of liberal leave usage, Plaintiff has no evidence of this other than his declaration. [Henion Decl. at ¶ 15.] This is not enough to create a genuine issue of material fact as to whether Mr. Sakagawa's decision to remove Plaintiff was motivated at least in part by Plaintiff's disability. See Nilsson v. City of Mesa, 503 F.3d 947, 952 n.2 (9th Cir. 2007) ("[a] conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact" (citation and quotation marks omitted) (alteration in original)). Mr. Sakagawa testified that he did not look into all of the circumstances of Plaintiff's poor attendance record. Some of the reasons Mr. Sakagawa discussed for Plaintiff's absence were: "personal problems", [Sakagawa Depo. at 38-39,] including unspecified things going on in life and with his family, [id. at 85;] Plaintiff going to school, [id. at 39;] and attending a union conference. [Hearing Trans. at 88.] Thus, unlike Mr. Sano, there is no evidence before the Court that Mr. Sakagawa knew that Plaintiff's absences were caused by his disability. The Court therefore finds that

Plaintiff's disability was not a motivating factor in Mr. Sakagawa's decision to remove Plaintiff.

Having reviewed the record in the instant case, this Court FINDS that Plaintiff has failed to raise a triable issue of fact as to whether he was removed "because of" his disability. The Court therefore CONCLUDES that Plaintiff cannot establish a prima facie case of disparate treatment disability discrimination.

2. Legitimate, Non-Discriminatory Reason

Even assuming, *arguendo*, that Plaintiff can establish a prima facie case of disparate treatment disability discrimination, this Court finds that the sustained charge of unauthorized movement of the security cameras is a legitimate, non-discriminatory reason for Plaintiff's removal. As noted, *supra*, Mr. Sakagawa, the deciding official, testified at the administrative hearing and during his deposition that his decision to remove Plaintiff was not based on Plaintiff's poor attendance. Insofar as Defendants disclaim any reliance on Plaintiff's disability, this Court will apply the McDonnell Douglas burden-shifting analysis. *See Mustafa*, 157 F.3d at 1175. It is therefore Plaintiff's burden to demonstrate at trial that Defendants' reason for his removal was pretextual. *See id.* at 1176.

3. Pretext

Plaintiff argues that he has met his burden to establish a triable issue of fact as to pretext where "the Deciding Official admits to using Plaintiff's medical condition approved absences against him in his decision to fire Plaintiff." [Mem. in Opp. at 14.] A plaintiff "may demonstrate pretext either directly by persuading the court that a discriminatory reason likely motivated [the defendant] or indirectly by showing that [the defendant's] proffered explanation is unworthy of credence." Diaz v. Eagle Produce Ltd. P'ship, 521 F.3d 1201, 1212 (9th Cir. 2008) (citation and quotation marks omitted) (applying McDonnell Douglas burden-shifting framework to claim under the Age Discrimination in Employment Act).

Plaintiff argues that there is direct evidence that his disability likely motivated Mr. Sakagawa's decision. This Court disagrees. As discussed, *supra*, Mr. Sakagawa denied basing his decision to remove Plaintiff on his poor attendance. Further, even if Mr. Sakagawa's decision was motivated at least in part by Plaintiff's poor attendance, there is no evidence that his consideration of Plaintiff's poor attendance amounted to a consideration of Plaintiff's disability. Plaintiff does not point to any other evidence in the record regarding pretext, nor has this Court found any. The Ninth Circuit has stated that "courts only require that an employer honestly believed its reasons for its actions, even if its reason is foolish or trivial

or even baseless." Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1063 (9th Cir. 2002) (citation and quotation marks omitted). This Court finds that Mr. Sakagawa honestly believed that Plaintiff's unauthorized movement of the security cameras was a serious offense which warranted removal.

Thus, assuming, *arguendo*, that Plaintiff can establish a prima facie case of disparate treatment disability discrimination, this Court FINDS that Plaintiff has not raised a triable issue of fact as to pretext. This Court therefore CONCLUDES that Defendants are entitled to summary judgment as to Plaintiff's claim for disparate treatment disability discrimination under the Rehabilitation Act.

B. Rehabilitation Act - Hostile Work Environment Claim

Plaintiff also alleges a hostile work environment claim under the Rehabilitation Act. [Complaint at ¶ 33.] In the Motion, Defendants argue that Plaintiff cannot establish his prima facie case because Plaintiff was removed for misconduct and there is no evidence that his removal was motivated by Plaintiff's disability. Plaintiff did not address his hostile work environment claim in his memorandum in opposition to the Motion. In their reply, Defendants argue that Plaintiff's failure to do so precludes him from presenting any evidence on the hostile work environment claim. This Court agrees and FINDS that Plaintiff has abandoned his hostile work environment claim.

See, e.g., Ramirez v. City of Buena Park, 560 F.3d 1012, 1026 (9th Cir. 2009) (noting that the appellant abandoned his state law claims by failing to address them in either his motion for partial summary judgment or his opposition to the defendants' motion for summary judgment). Even assuming, *arguendo*, that Plaintiff has not abandoned this claim, this Court FINDS that Plaintiff cannot establish a prima facie case because the Agency's employment actions were based on Plaintiff's unauthorized movement of the security cameras, not on Plaintiff's disability. This Court therefore CONCLUDES that Defendants are entitled to summary judgment as to Plaintiff's hostile work environment claim under the Rehabilitation Act.

C. Title VII - Hostile Work Environment Claim

Count One of the Complaint alleges a hostile work environment claim under Title VII. Count One is based on the same conduct as Plaintiff's claims challenging the MSPB's decision and his Rehabilitation Act claims. [Complaint at ¶ 32.] Under Title VII, it is unlawful for an employer to "discharge any individual . . . because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1).

In the instant Motion, Defendants raised essentially the same arguments as to both Plaintiff's Title VII hostile work environment claim and his Rehabilitation Act hostile work environment claim. Plaintiff did not address his Title VII

hostile work environment claim in his memorandum in opposition to the Motion and therefore also abandoned this claim. See Ramirez, 560 F.3d at 1026. Moreover, this Court notes that, to the extent that Count One alleges a hostile work environment based on disability discrimination, Defendants are entitled to summary judgment because "Title VII does not encompass discrimination on the basis of disability." See Davis v. Team Elec. Co., 520 F.3d 1080, 1093 n.8 (9th Cir. 2008). To the extent that Count One alleges a hostile work environment based on discrimination because of Plaintiff's race, color, religion, sex, or national origin, there is no evidence in the record to support such a claim. This Court therefore CONCLUDES that Defendants are entitled to summary judgment as to Plaintiff's Title VII hostile work environment claim.

CONCLUSION

On the basis of the foregoing, the decision of the Merit Systems Protection Board, dated August 30, 2005, is HEREBY AFFIRMED, and Defendants' Motion to Dismiss, and/or for Summary Judgment, filed September 8, 2008, is HEREBY GRANTED. The Court DIRECTS the Clerk of the Court to enter judgment in favor of Defendants on all of Plaintiff's claims.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, July 10, 2009.



/S/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States Magistrate Judge

RUSSELL D. HENION V. UNITED STATES POSTAL SERVICE, ET AL; CIVIL
NO. 06-00298 LEK; ORDER AFFIRMING MERIT SYSTEMS PROTECTION
BOARD'S DECISION AND GRANTING DEFENDANTS' MOTION TO DISMISS
AND/OR FOR SUMMARY JUDGMENT